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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. A-454

KAREN DERBY, P.P.A.
**Petitioner**

v.

THE CONNECTICUT LIGHT AND POWER COMPANY
**Respondent**

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

James P. Caulfield, III
Main St., Waterbury, Conn.
is a member of the U.S. Supreme Court Bar and William B. Hennessy is a member of the Connecticut Bar.

William B. Hennessy,
Attorney for Petitioner

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**68 YLJ 633** .....

**Post v. Perkins**, 87 Conn. 71, 73 .....

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1974

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NO. A-454

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KAREN DERBY,
**Petitioner,**

- V. -

THE CONNECTICUT LIGHT AND POWER COMPANY
Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner Karen Derby, p. p. a., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on July 30, 1974.

## I. CITATION

A decision of the Connecticut Supreme Court, Karen Derby v. The Connecticut Light and Power Company - Conn. - , Connecticut Law Journal Volume XXXVI, No. 8, p. 14 (August 20, 1974) (a copy of which is annexed hereto).

## II. JURISDICTIONAL GROUNDS

On July 30, 1974 the Connecticut Supreme Court entered judgment "There is error, the judgment is set aside and the case is remanded with direction to render judgment for the defendant notwithstanding the verdict." The verdict was for $25,000 in favor of the plaintiff. Thereafter on September 3, 1974 in accordance with the Connecticut Rules of Practice, Connecticut Practice Book of 1963, Sections 702 to 704, a motion to reargue was filed, which motion was denied on October 10, 1974 (House, Ch. J.) and on November 6, 1974 (Shapiro, Acting Ch. J.) copies of which motions to reargue and briefs thereon of plaintiff are annexed hereto. The jurisdiction of this court is invoked under the authority of 28 U.S.C.A. #1257 (3).

## III. QUESTIONS SOUGHT TO BE REVIEWED

1. Is a plaintiff's right as guaranteed by the Fourteenth Amendment of the Constitution of the United States denied when the Supreme Court of the State of Connecticut transmutes propositions of fact into propositions of law in violation and evasion of its own rules and the law and the evidence, as pointed out in plaintiff's motions for reargument and supporting documents dated September 3 and October 7 and October 15, 1974, pp. - b to - b and - b to - b.

## IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

The plaintiff relies upon the following provisions of the United States Constitution:

"Amendment XIV, Section: ...; nor shall any State deprive any person of life, liberty or property, without due process of law ..." Constitution, Amendments 13 to 14, U. S. C. A. p. 33 (1972 Edition),

## V. STATEMENT OF THE CASE

As in reargument motions annexed hereto and

## VI. ARGUMENT OF LAW

As in reargument motions (9b and 16b) and

Conceded (by par. 81 of the finding in defendant's proofs), and elsewhere, is defendant's knowledge of the obvious danger and the federal question contained in the October 7 paper in support of the motion for reargument. There is no adequate support in the law and evidence for the defendant's side on knowledge. Nor on "the other elements" referred to in the Derby v. The Power Company decision, and the petitioner earnestly requests that this Court grant hearing required to adequately present the evasions on the basis of which the federal question was presented and is pursued here. Chief Justice Warren in his separate opinion in Wolfe v. North Carolina supra, may or may not have fitted facts there about incident subsequent to judgment but his reasoning was right and it fits here, in the instant. District Court Judge Blumenfeld in the Ralls case cited in October 7, 1974 brief appended hereto, may not have fitted "exhausting" the remedy in the state court to the facts and law there, but his reasoning about the appendix system was and is right and fits here in instant case, and this plaintiff-petitioner follows the rules in all three courts to the best of his ability and won strictly according to the rules procedurally, and substantively, in the trial court and lost on appeal not according to the rules, it is respectfully submitted, in the Supreme Court of Connecticut. Hence the case should be sent back, remanded at least for new trial, loaded with false assumptions in defendant's brief and appellate court's decision, as it is.

The record as corrected was not assigned with reference to paragraph 17 of the finding. R. p. 28 bottom of page. R. p. 14 paragraph 17, R. p. 27 assignment of errors No. 3. A claim which is not covered by the assignment of errors and which does not appear to have been made in the court below, is not reviewable on appeal. "This claim is not within the reasons of appeal, and it does not appear that it was made in the court below. "**Post v. Perkins**, 87 Conn. 71, 73.

The defendant in this case never made the correction of the Finding (see bottom of page 28 of record with reference to paragraph 17, Record page 14) in the Assignment of Errors (see Record page 27 with reference to said paragraph 17). It is its assignment of errors and the trial court judge could not have changed that.

"AMERICAN LAW

"RESTATEMENT
of the
"LAW

---

SECOND
TORTS 2d

Emphasis denotes changes:

#342. Dangerous Conditions Known to Possessors

"A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

"(a) the possessor knows **or has reason to know** of the condition **and should** realize that it involves an unreasonable risk of harm to such licensees, and **should expect** that **they** will not discover or realize the **danger**, and

"(b) he fails to exercise reasonable care to make the condition safe', or to warn the licensees of the condition and the risk involved, and

"(c) the licensees do not know or have reason to know of the condition and the risk involved.

"comment:

"(a. The words 'the risk' denote not only the existence of a risk, but also it's extent. Thus 'knowledge' of the risk involved in a particular condition implies not only that the condition is recognized as dangerous but also that the chance of harm and the gravity of the threatened harm are appreciated.

"(b) If the licensees are adults, the fact that the condition is obvious is usually sufficient to apprise them, as fully as the possessor, of the full extent of the risk involved in it.

"On the other hand, the possessor should realize that the fact that a dangerous condition is open to the perception of child licensees may not be enough to entitle him to assume that they will appreciate the full extent of the risk involved therein. As to this, see #343 B.

"(c) The possessor of land owed to a licensee no duty to prepare a safe place for the licensee's reception or to inspect the land to discover possible or even probable dangerous.

There have been like changes in the Restatement #339, called the most significant in the whole subject of Torts, the section.

The significance of "has reason to know" is pointed out in Sec. 12 of the Restatement under Agency.

"(1) The words 'reason to know' are used throughout the Restatement of this subject to denote the fact that the actor has information from which a person of

reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.

"(2) The words 'should know' are used, throughout the Restatement of this subject to denote the fact that a person of reasonable prudence and intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists.

"Comment:

"(a) Both the expression 'reason to know' and 'should know' are used with respect to existent facts. These two phrases, however, differ in that 'reason to know' implies no duty of knowledge on the part of the actor whereas 'should know' implies that the actor owes another the duty of ascertaining the fact in question. 'Reason to know' means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist. 'Should know' indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty. Both the phrase "reason to know' and 'should know' are used throughout the Restatement of Torts in the same sense as they are used in the Restatement of Agency. (See Restatement of Agency, Second, Sec. 9).

## CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT.

Petitioner, Karen Derby, P.P.A.

William B. Hennessy
Attorney

SECOND: The defendant offered evidence to prove and claimed to have proved:

76 (847)
77 (847-849)
78 (850-861)
79 (103, 132, 227, 359)
80 (190, 195, 225, 307)
81 (151, 258, 259, 306, 308, 359, 360, 364, 389, 430, 719)
82 (190, 195, 224, 309, 403)
83 (258, 259)
84 (432, 437-440, 591, 696, 717, 721, 722)
85 (307)
86 (374, 376, 389, 414, 432, 546, 554)
87 (707, 716)
88 (5)8, 513-515)
89 (517)
90 (499, 515)
91 (511)
92 (502)
93 (474, 507, 522, Ex. E-1)
94 (510)
95 (780, 781)
96 (782, 784)

# APPENDIX

## APPENDIX
## [OPINION AND JUDGMENT OF SUPREME COURT OF CONNECTICUT]

**SUPREME COURT**
**June Term, 1974**
Docket No. 7317

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Karen Derby v. The Connecticut Light and power company

Action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant, brought to the Superior Court in New Haven County at Waterbury and tried to the jury before **Parskey, J.**; verdict and judgment for the plaintiff and appeal by the defendant. **Error; judgment directed.**

**Walter F. Torrance, Jr.**, with whom was **Anthony M. Fitzgerald**, for the appellant (defendant).

**William B. Hennessy**, for the appellee (plaintiff).

SHAPIRO, J. This action was brought to the Supreme Court on behalf of Karen Derby, a minor, hereinafter referred to as the plaintiff, by her father to recover damages for personal injuries allegedly sustained when she fell from an apple tree located on the property of the defendant, the Connecticut Light and Power Company. The amended complaint alleges that while climbing the tree on August 22, 1967, the plaintiff, then seven years old, stepped on a rotten or dead tree limb which broke and caused her to fall on a bed of rocks.

The case was tried to a jury, and when all the evidence had been submitted, the defendant made a motion for a directed verdict. The trial court reserved decision on the motion, and committed the case to the jury. The

jury rendered a verdict for the plaintiff and the trial court refused to set the verdict aside and enter a judgment notwithstanding the verdict. The defendant has appealed to this court from the judgment rendered on the verdict.

The defendant has assigned as error the denial of its motion for judgment notwithstanding the verdict, the denial of its motion to set aside the verdict, the inclusion of seventeen paragraphs in the finding, the exclusion of two paragraphs of the draft finding from the finding and certain aspects of the charge to the jury as appears in six paragraphs of the finding.

The defendant claims that the trial court erred in denying its motion for judgment notwithstanding the verdict because: (1) there was no evidence from which the jury could properly conclude that the defendant knew or had reason to know of the condition of the branch upon which the plaintiff was standing and which gave rise to her injuries; (2) the jury could not properly conclude that the defendant would have any reason to believe that the branch would involve an unreasonable risk of harm to a child of the age, judgment and experience of the plaintiff; (3) the jury could not properly conclude that the defendant would have reason to believe that a child of the plaintiff's age, judgment and experience would not discover the condition of the branch or realize the risk of standing on it; and (4) the jury could not reasonably conclude that the plaintiff was not guilty of contributory negligence.

The defendant claims that it was error to deny the motion to set aside the verdict for the same reasons, and adds as additional reasons the claims that the verdict was excessive and the charge erroneous.

The decision of the trial court on a motion to set aside the verdict and for a judgment notwithstanding the

verdict is tested by an examination of the evidence printed in the appendices to the briefs. **Orzech v. Wynne**, Conn. (35 Conn. L.J., No. 52, pp. 8, 9); **Meade v. Warehouse, Inc.**, Conn. (35 Conn. L.J., No. 25, p. 17).

Our examination leads us to conclude that it was error to deny the motion to set aside the verdict and for a judgment notwithstanding the verdict and for a judgment notwithstanding the verdict because the appendices lack evidence sufficient to prove that the defendant corporation knew or **should** have known of the condition which allegedly caused the complained of bodily harm to the plaintiff.

In their respective briefs, the plaintiff asserts, and the defendant concedes, that the status of the plaintiff while on the land of the defendant was that of a licensee. On numerous occasions this court has indicated that the governing law in situations such as the present is well-expressed in § 342 of the Restatement of the Law of Torts. **Doughterty v. Graham**, 161 Conn. 248, 251, 287 A.2d 382; **Bears v. Hovey**, 159 Conn. 358, 360-61, 269 A.2d 77; **Sokoloski v. Pugliese**, 149 Conn. 299, 301, 179 A.2d 603; **Hennessey v. Hennessey**, 145 Conn. 211, 213, 140 A2d 473; **Schiller v. Orange Hall Corporation, 144 Conn.** 327, 329, 130 A.2d 798; **Laube v. Stevenson**, 137 Conn. 469, 474-75, 78 A2d 693. That section states that: "(a) possessor of land is subject to liability for bodily harm caused to gratuitous licenses by a natural or artificial condition thereon, if but only if, he (a) **knows** of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits them to enter or remain upon the land, without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to warm them of the condtion and the risk involved therein." (Emphasis added.)

At the time of the accident in the present case, however, Restatement (Second), Torts had been

adopted and promulgated. One change made therein is that clause (a) of ¶ 342 of the Restatement (Second), 2 Torts, has been reworded to state that: ' (a) possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor **knows or has reason to know of the condition** . . ." (Emphasis added.) As used in Restatement (Second), 2 Torts ¶ 342, " 'reason to know' means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist." Restatement (Second), 2 Torts ¶ 12, comment (a). Even measured by the seemingly less restrictive standard of the Restatement (Second), the evidence in the instant case is insufficient to warrant the imposition of liability on the defendant.

The plaintiff offered evidence to prove and claimed to have proved the following facts: On August 22, 1967, Karen Derby, then seven years and eight months of age, fell and sustained injuries to her head when a branch broke from an apple tree on land owned by the defendant. The land of the defendant consists of two contiguous parcels of land located in Waterbury. The southerly parcel is a strip of land extending approximately 600 feet in an easterly-westerly direction which was acquired by the defendant in 1958 as a right-of-way for its electric transmission lines. The northerly piece, consisting of approximately 2.3 acres, was acquired in 1960 to widen the right-of-way by forty or fifty feet. The defendant had to buy the whole northerly piece to acquire the forty or fifty feet actually needed. It never found use for the rest of it which extended from the right-of-way to a street. It remained without use, utility, care or maintenance. It was regarded as a playground by children who lived nearby, and was known to both children and adults as "the field." It

contained the apple tree involved in the present case, but none of its apples was ever picked by the defendant. For years, children, including the plaintiff, played regularly under the tree and climbed it for the apples. The property was never fenced and never posted, and contained no signs of ownership or warning except for the defendant's transmission line towers located at the rear of the property. Those towers were posted "Danger -- High Voltage" and in smaller letters "The Connecticut Light & Power Company." The above claims of proof are all supported by evidence in the appendices.

There is, however, no evidence in the appendices to support the claim of proof made by the plaintiff that the defendant "knew by observation and imputation and fair inference and reason" that there existed on its property a condition which "was highly dangerous and constituted an unreasonable risk of serious injury or death to the children including the plaintiff . . . ." There is evidence to the effect that agents of the defendant corporation were expected to report trees and tree limbs likely to fall or blow off into the transmission lines, but no evidence that the apple tree in question was located in the transmission line right-of-way, or close enough to the right-of-way so that it presented such a hazard. There is, also, evidence that one of the defendant's repairmen observed the dead or rotten limb three of four weeks before the accident; but no evidence that the repairman was operating within the scope of his authority when he made the observation, that his duties involved repairs or maintenance in the area where the tree was located or that he or any other agent of the defendant was charged with a duty to report the dead or rotten limb.

This case, therefore, does not present a situation appropriate for application of the well-settled rule that notice to or knowledge of an agent, while acting within the scope of his authority and in reference to a matter

over which his authority extends, is notice to, or knowledge of, the principal. 2 Mechem, Agency (2d Ed.) § 1803. While it is true that matters coming to the knowledge of an agent of a corporation within the scope of his authority are conclusively presumed to have been reported to his principal; **Blakeslee v. Water Commissioners**, 121 Conn. 163, 180, 183 A. 887; **Cone v. Cullen**, 108 Conn. 126, 130, 142A. 674; there is nothing in the evidence of the present case to indicate that the condition of the apple tree was a matter within the scope of the authority of the repairman who may have seen it, or any other agent who may have entered onto the property.

Because of this insufficiency of evidence, it cannot be said that the defendant had actual knowledge of the complained-of condition. Similarly, there is no evidence sufficient to impute such knowledge to the defendant. The duty which a licensor owes to a licensee on the licensor's premises does not arise where there is neither actual knowledge on the part of the licensor of a condition which he should realize involves an unreasonable risk of harm to the licensee nor circumstances from which such knowledge could be imputed to the licensor. See **Corona v. Jacovino**, 161 Conn. 462, 468, 290 A.2d 225; **Haffey v. Lemiuux**, 154 Conn. 185, 189, 224 A2d 551; **Lubenow v. Cook**, 137 Conn. 611, 614, 79 A.2d 826; **Ward v. Avery**, 113 Conn. 394, 397, 155 A. 502.

We have chosen to dispose of this appeal on the ground stated, but that is not to imply that the circumstances of this case embrace the other elements essential to a recovery for injuries incurred on the property of a licensor.

There is error, the judgment is set aside and the case is remanded with direction to render judgment for the defendant notwithstanding the verdict.

In this opinion the other judges concurred.

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**LETTER OF WALTER F. TORRNACE, DEFENDANT'S ATTORNEY**
**June 7, 1974**

Hon. John A. Speziale
Judge of the Superior Court
Drawer D, Station A
Hartford, Connecticut 06106

Re: No. 7317 in the Superior Court --
Karen Derby vs. The Connecticut
Light and Power Company

Dear Judge Speziale:

During the argument of the above matter on June 5 you inquired of me whether so much of the Court's charge as appears in paragraph 99 on page 24 of the record (excluding the last paragraph thereof) was given in accordance with a request by the defendant. I stated that it was my recollection that it was so given. I now find that I am in error.

In paragraph 99 (b) the Court added the words "or had reason to know" and in paragraph 99 (d) the Court added the phrases "or has reason to know," "or should realize" and "or should expect." Otherwise the charge as set forth in paragraphs 97, 98 and 99 (again excepting the last paragraph of 99) was as requested by the defendant.

I trust that the foregoing fully answers your inquiry.

Very truly yours,

Walter F. Torrance, Jr.

WFT,JR./kmp
cc: Hon Louis Shapiro
Hon. Alva P. Loiselle
Hon. Herbert S. MacDonald
William B. Hennessy, Esq.

**LETTER OF HAROLD J. IVEY, CLERK**
**DATED AUGUST 20, 1974**
**STATE OF CONNECTICUT**
**SUPREME COURT**

New Haven, Conn.,

William B. Hennessy
Attorney-at-Law

August 20, 1974

Please take notice that the Supreme Court has this day decided the following case:

#7317 Karen Derby vs. The Connecticut Light and Power Company.

There is error, the judgment is set aside and the case is remanded with direction to render judgment for the defendant notwithstanding the verdict.
Opinion by Shapiro, J.
Date of Judgment: July 30, 1974
Decision Announced: August 20, 1974

Harold J. Ivey, Clerk

KAREN DERBY : SUPREME COURT

KAREN DERBY : SUPREME COURT

VS. : STATE OF CONNECTICU

THE CONNECTICUT LIGHT AND POWER COMPANY : SEPTEMBER 3, 1974

**MOTION FOR REARGUMENT**

The plaintiff respectfully moves for a reargument of the appeal in the above entitled matter (see August 20, 1947, Connecticut Law Journal).

PLAINTIFF (appellee)

By ----------

William B. Hennessy
Attorney

**ORDER**

After hearing had, and it appearing to the Court that the foregoing Motion ought to be granted/denied, it is hereby O R D E R E D, granted/denied.

THE COURT

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Judge / Clerk

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NO. 7317

KAREN DERBY, P.P.A. ) supreme court

vs. ) STATE OF CONN.

THE CONNECTICUT LIGHT AND POWER COMPANY ) OCTOBER 7, 1974

BRIEF OF THE PLAINTIFF (APPELLEE) ON THE PLAINTIFF'S MOTION FOR REARGUMENT

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The decision in instant Derby v. The Connecticut Light and Power Company, - Conn. -, Connecticut Law Journal Vol. XXXVI, No. 8 (August 20, 1974) 14, at page 14, states: "The defendant has assigned as error ... seventeen paragraphs of the finding . . .". But see assignment of error No. 3, R. pp. 27-28 and defendant's brief top of pages 11 and 13 abandoning all of them except part of paragraph 17 of the finding, on liability. Paragraphs 42, 46, 49 and 50 of the finding parts of which the defendant also assigns as error are of no importance. One of the paragraphs on liability in the finding, so abandoned, is paragraph 22 of the finding, R. p. 15, about which the decision states at p. 15: "There is, however, no evidence in the appendices" to support it, as if it were not abandoned.

The decision then states at p. 16: "We have chosen to dispose of this appeal on the ground stated, but that is not to imply that the circumstances of this case embrace the other elements essentials to a recovery for injuries incurred on the property of a licensor.", a generalization which prompts a reference to the decision in general in the motion to reargue parenthesis at the end, as well as the element of knowledge of the defendant in particular, "the ground stated" at page 14 of the decision:

> "Our examination leads us to conclude that it was error to deny the motion to set aside the verdict and for judgment notwithstanding the verdict because the appendices lack evidence sufficient to prove that the defendant corporation knew or should have known of the condition which allegedly caused the complained of bodily harm to the plaintiff."

In the first place "knew or should have known" is the language of the wrong Sec. 342 of Restatement used by the defendant (as see defendant's brief p. 10 under

"Discussion" leaving out the changes "or had reason to know" after the word "(a) know" in line 4 of the quoted portion and the words "and should realize" instead of "realizes" in said line 4, and leaving out the words "of harm to such licensees" after the word "risk" in line 5 of said quoted portion, instead of "licensee" in said line 5. This error of the defendant is admitted by the defendant's trial counsel in his letter of June 7, 1974, attached hereto. The trial court in its charge the additional words contained in the Restatement (Second), Torts, Sec. 342, as the defendant in that letter admitted to Judge Speciale and this court in that letter. Yet the decision in this case, at p. 14 last paragraph and p. 15 first paragraph pronounces it a distinction without a difference so to speak in this case and concludes that paragraph on p. 15 of the decision with these words: "Even measured by the seemingly less restrictive standard of the Restatement (second), the evidence in the instant case is insufficient to warrant the imposition of liability on the defendant", and this plaintiff hereby points that quote out as a glaring example, flying in the face of the law and evidence in the plaintiff's brief pp. 9 and 10 and the due process and equal protection rights of this plaintiff contained in the XIVth Amendment of the Constitution of the United States and of the Constitution of the State of Connecticut, and constituting "a manifestation of the lamentable tendency to transmute propositions of fact into propositions of law, which Gleenville Williams has called the besetting sin of the law of torts" (68 YLJ 633). And see Memorandum of Decision in Ralls v. Manson, United States District Court, District of Connecticut, May, 1974, Civil No. 11-205; also Mansell v. Saunders, C.A. Fla., 1967, 372 F. 2d 573.

In the second place: "It would seem therefore that the board of directors or trustees chose to transact the business of the corporation through the agency of these 'managing men'. The knowledge of an agent, in matters pertaining to his agency, and within the scope of his authority, is the knowledge of the principal. This

principle is peculiarly applicable to corporations, which must conduct their business through agents. And where a corporation has two agents of equal power and authority notice to one is constructive notice to the other, and, therefore, notice to the corporation, ... Under these circumstances, and for these reasons a majority of the court do not hesitate to hold ... that the plaintiff is entitled to a new trial. PERRY V. SIMPSON MANF. CO?, 37 CONN. 520 at pp. 538-539.

The two "managing men" of the defendant in instant were Harold N. Adams and Charles Beach (plaintiff appendix 21A); and see unnumbered last page of the Index to Appendix of plaintiff, for further reference to the testimony of these "managing men" whose knowledge was defendant's. Also Lane v. United Electric Light and Water Co., 88 Conn. 670, 674, Scorpion v. Rep. Am. Inc., 131 Conn. 42.

In the instant case the defendant saw fit to conduct its business through these managing men and their subordinates, as argued in plaintiff's brief and supported by appendices. The judgment should be affirmed, or the plaintiff entitled at least to a new trial and probable settlement of this case.

The letter from defendant's counsel attached was dehors the record, defendant's brief was utterly without due procedure and without procedural and substantive due process, "Discussion" being for the trial court under on the spot necessity. The plaintiff followed the forms and appendix procedure, precisely, including with reference to defendant's letter attached. The decision does violence to the appendix system and appellate procedural and substantive due process and equal protection of the law.

Wright on Conn. Law of Torts, Sec. 53 at p. 77: Also a recent trend has been noted which imposes liability on the possessors of land who maintained trees in a dangerous condition in urban areas.

We respectfully request a reading of the briefs in this case and a noting that there was really only one exception, the small last paragraph of paragraph 99 of the finding, even that solidly supported by the evidence in the appendix of the plaintiff that the defendant and the complaint about the finding paragraphs a most obviously false assuming and perfectly frivolous attempt to make something of PART OF ONE PARAGRAPH, paragraph 17 of the finding, without a scintilla of reason in, without a trace of substance of truth in it, pars. 42, 46, 49 and 50 of absolutely no importance and not even briefed, and the rest of the paragraphs in assignment of error No. 3, R. pp. 27-28 ABANDONED (Defendant's brief pp. 11 and 13). The integrity of our jurisprudence, it is respectfully submitted, demands that this be undone here, with the return of the Chief Justice and Justice Bogdansky not sitting at argument of June 5, 1974.

In Daury v. Ferraro, 108 Conn. 386 Chief Justice Wheeler overruled himself, for the integrity of our jurisprudence.

RESPECTFULLY SUBMITTED,
PLAINTIFF,

BY ----------

By William B. Hennessy
Her Attorney

**LETTER OF VINCENT J. FASANO**
**ASSISTANT CLERK**
**DATED OCTOBER 10, 1974**
**STATE OF CONNECTICUT**
**SUPREME COURT**

New Haven, Conn.,

William B. Hennessy
Attorney-at-Law

October 10, 1974

Please take notice that the Supreme Court has decided the following motion:

#7317 Karen Derby vs. The Connecticut Light and Power Company.

"October 1, 1974. The plaintiff's motion to reargue is denied. By the Court, House, Chief Justice."

Vincent J. Fasano, Assistant Clerk

NO. 7317

KAREN DERBY, P.P.A. ) SUPREME COURT

VS. ) STATE OF CONN

THE CONNECTICUT LIGHT AND POWER COMPANY ) OCTOBER 15, 1974

**MOTION FOR REARGUMENT ON PLAINTIFF'S [APPELLEE'S] MOTION FOR REARGUMENT OF OCTOBER 7, 1974,**

Referring to decision on plaintiff's motion to reargue and notice thereof of denial dated October 10, 1974 stating:

> "October 1, 1974. The plaintiff's motion to reargue is denied. By the Court, House, Chief Justice,"

and referring further to the plaintiff's "BRIEF OF THE PLAINTIFF (APPELLEE)" dated October 7, 1974 on plaintiff's motion for reargument and particularly paragraphs 2 and 3 thereof, pages 1 and 2 of said brief, and referring further to matters dehors the record including the letter of defendant of June 7, 1974 and despite the record and the abandoned paragraphs referred to at pp. 3 and 4 of said brief of October 7, 1974, and the legally, logically and factually conceded and unrefuted facts and law of briefs and arguments on appeal argued June 5, 1974, the error of the implication contained in the concluding paragraphs of the decision Derby v. The Connecticut Light and Power Company, - Conn. - Connecticut Law Journal Vol. XXXVI, No. 8, at p. 16 is **obvious** and entitles the plaintiff to a new trial, at least, (as distinguished from judgment against her notwithstanding the verdict) as a **natural** conclusion. This defendant had the knowledge in particular of the danger from the proximity of the housing project, the paths directly to it and the regular use of its land as a playground by the 100 children of the project, and the utility particularly nil; the generality other elements") in said concluding paragraph (next to last on p. 16 of the decision) is fully argued elsewhere on the right Section 342 of Restatement, contained in the word "obvious", as to this danger, certainly as obvious to the defendant, and the difference is in the change in the new Restatement "has reason to know" from the proximity, paths and playground, in consequence of which defendant's Mr. Torrance, who tried the case, honestly concedes in his

letter to Judge Speziale of June 7, 1974, attached to previous motion to reargue, that the whole thing was reduced to the small last paragraph of par. 99 of the finding, which plaintiff's appendix supplies in evidence' that defendant did in fact do nothing.

In view of which it is respectfully submitted that the plaintiff is entitled at least to a new trial.

Plaintiff,

By William H. Hennessy
Her Attorney

**LETTER OF VINCENT J. FASANO**
**ASSISTANT CLERK**
**DATED NOVEMBER 6, 1974**
**STATE OF CONNECTICUT**
**SUPREME COURT**

New haven, Conn.,

William B. Hennessy
Attorney-at-Law

November 6, 1974

Please take notice that the Supreme Court has decided the following motion:

#7317 Karen Derby vs. The Connecticut Light and Power Company

"November 1, 1974. The plaintiff's 'Motion for Reargument on Plaintiff's (appellee's) Motion for Reargument of October 7, 1974' in the appeal from the Superior Court in New Haven County at Waterbury is denied. By the Court, Shapiro, Acting Chief Justice."

Vincent J. Fasano, Assistant Clerk

**LETTER OF WILLIAM B. HENNESSY PLAINTIFF'S [APPELLEE'S, PETITIONER'S] ATTORNEY, DATED JANUARY 8, 1975**

Office of the Clerk
Supreme Court of the United States
Washington, D. C. 20543

Dear Sir: Re: Karen Derby, P.P.A. vs. The Connecticut Light and Power Company

Enclosed herewith please find, anent mine of yesterday dated January 7, 1975 and entitled MOTION FOR EXTENSION OF TIME FOR COMPLETION AND FILING OF PETITION FOR WRIT OF CERTIORARI and a copy of which letter is also enclosed herewith, pertinent affidavit to January 7th motion, and copies of orders, decision and reargument motions to be followed by the properly certified originals as referred to in the said January 7 motion.

Respectfully,

William B. Hennessy

WBH:R
cc: Carmody & Torrance
Clerk of Conn. Supreme Court

KAREN DERBY, P.P.A. ) THE SUPREME COURT

VS. ) OF THE UNITED STATE

THE CONNECTICUT LIGHT AND POWER COMPANY ) JANUARY 7, 1975

**MOTION FOR EXTENSION OF TIME FOR COMPLETION AND FILING OF PETITION FOR WRIT OF CERTIORARI**

---

I, Robert C. Derby, father and natural guardian of Karen Derby, a minor, plaintiff-appellee-petitioner in above cause, hereby move for extension of time to February 10, 1975, to file petition for writ of certiorari therein, a nd assign:

1. That on December 31, 1974, at 10 A.M. I sustained a severe injury, a fracture and dislocation of the right elbow, for which I have been hospitalized and will require thereapy for a few more weeks and, as counsel for the petitioner in above will require until about February 10, 1975, for completion of the petition for writ of certiorari therein and the neccessary papers relating thereto.

2. That the necessary papers, under Rule 23, the decision and related motions, orders, testimony and references, will not be properly certified and ready until next month, reasonable.

RESPECTFULLY SUBMITTED

KAREN DERBY, P.P.A.

BY William B. Hennessy
Her Attorney

January 8, 1975

I HEREBY CERTIFY that I, William B. Hennessy, an attorney, commissioner of the Superior Court, and duly licensed, this day served a copy hereof upon the defendant by presenting same to its attorneys, Carmody & Torrance, Attorneys at Law, 37 Leavenworth Street, Waterbury, Connecticut.

**William B. Hennessy**

STATE OF CONNECTICUT
ss. Waterbury, January 8, 1975
COUNTY OF NEW HAVEN

Personally appeared William B. Hennessy, subscriber of the foregoing, and made oath to the foregoing certification, before me,

---

COMMISSIONER OF THE SUPERIOR COURT

**SUPREME COURT OF THE UNITED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, D.C. 20543**
January 14, 1975

William B. Hennessy, Esq.
42 Bank Street
Waterbury, Connecticut 06702

**Re: Karen Derby v. The Connecticut Light and Power Company, No. A-454**

Dear Mr. Hennessy:

Your application for an extension of time in which to file a petition for writ of certiorari in the above-entitled case has been presented to Mr. Justice Marshall, who, on January 13, 1975, signed an order extending your time to and including February 10, 1975.

A copy of the Justice's order is enclosed.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Francis J. Lorson
Deputy Clerk

Enclosure

cc: Carmody & Torrance
Attorneys at Law
37 Leavenworth Street
Waterbury, Connecticut 06702

**SUPREME COURT OF THE UNITED STATES**

**No. A-454**

KAREN DERBY, Petitioner

v.

THE CONNECTICUT LIGHT AND POWER COMPANY

---

**ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

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UPON CONSIDERATION of the application of counsel for petitioner, IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including **February 10, 1975.**

S/ Thurgold Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of January, 1975.

KAREN DERBY, P.P.A. ) THE SUPREME COURT

VS. ) OF THE UNITED STATE

THE CONNECTICUT LIGHT AND ) FEBRUARY 8, 1975
POWER COMPANY

**MOTION FOR ADDITIONAL EXTENSION OF TIME FOR COMPLETION AND FILING OF PETITION FOR WRIT OF CERTIORARI**

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The plaintiff-appellee-petitioner in above hereby respectfully moves for additional extension of time to March 10, 1975, to file her petition for writ of certiorari therein, and assigns:

That counsel, due to injury described in previous motion dated January 7, 1975, granted and ordered extended to February 10, 1975 (Order dated (January 13th, 1975, Marshall, J), finds that he will reasonably require the time extended to March 10, 1975 for the purpose, due to the said injury and additional time for recovery therefrom, to file the PETITION FOR WRIT OF CERTIORARI.

RESPECTFULLY SUBMITTED,

KAREN DERBY, P.P.A.

BY WILLIAM B. HENNESSY
HER ATTORNEY

FEBRUARY 8, 1975

I HEREBY CERTIFY that I, William B. Hennessy, an attorney, commissioner of the Superior Court, and duly licensed, this day served a copy hereof upon the defendant by mailing same to its attorneys, Carmody & Torrance, Attorneys at Law, 37 Leavenworth Street, Waterbury, Connecticut.

**William B. Hennessy**

STATE OF CONNECTICUT
ss. Waterbury, February 3, 1975
COUNTY OF NEW HAVEN

Personally appeared Wiiliam B. Hennessy, subscriber of the foregoing, and made oath to the foregoing certification, befor me,

---

COMMISSIONER OF SUPERIOR COURT

**SUPREME COUR f OF THE UNITED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, D.C. 20543**
February 13, 1975

William B. Hennessy, Esq.
42 Bank Street
Waterbury, Connecticut 06702

**Re'; Karen Derby v. The Connecticut Light and Power Company, No. A-454**

Dear Mr. Hennessy:

Your application for a further extension of time in which to file a petition for writ of certiorari in the above entitled case has been presented to Mr. Justice Blackmun in the absence of Mr. Justice Marshall. Mr. Justice Blackum, on February 12, 1975, signed an order further extending your time to and including March 10, 1975.

A copy of the Justice's order is enclosed.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Franics J. Lorson
Deputy Clerk

dm
Enclosure

cc: Carmody & Torrance
Attorneys at Law
37 Leavenworth Street
Waterbury, Connecticut 06702

**SUPREME COURT OF THE UNITED STATES**

No. A-454

KAREN DERBY, Petitioner

V.

THE CONNECTICUT LIGHT AND POWER COMPANY

---

**ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

---

UPON CONSIDERATION of the application of counsel for petitioner IT IS ORDERED that the time for filing a petition for writ of certiorari in the aboveentitled cause be, and the same is hereby further extended to and including March 10, 1975.

S/ Harry A. Blackum
Associate Justice of the Supreme
Court of the United States

Dated this 12th
day of February, 1975.

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1974

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**No. 74-1136**

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KAREN DERBY, P.P.A.

Petitioner

v.

THE CONNECTICUT LIGHT AND POWER COMPANY

Respondent

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

William B. Fitzgerald, Jr.
~~Walter B. Torrance, Jr.~~
Carmody & Torrance
P. O. Box 1110
Waterbury, Conn. 06720
Telephone: (203) 757-1521

Attorney for Respondent

## Opinions Below

The opinion of the Supreme Court of Connecticut in this matter is officially reported in 36 Conn. L.J. No. 8, page 14 (1974). A copy of this opinion is appended to the petition.

## Jurisdiction

The petitioner (hereinafter referred to as plaintiff) invokes the jurisdiction of this Court under 28 USC §1257(3), apparently claiming that she has been denied due process of law by the action of the Supreme Court of Connecticut in setting aside a judgment in her favor in a personal injury action and directing judgment for the defendant notwithstanding the verdict.

The portion of the Constitution of the United States relevant to such a claim would be the "due process" clause of Amendment XIV §1, providing: "Nor shall any State deprive any person of life, liberty or property, without due process of law".

## Statement of the Case

The plaintiff brought an action in the Connecticut Superior Court to recover damages for personal injuries allegedly sustained when she fell from an apple tree located on property of the respondent (hereinafter referred to as defendant).

The case was tried to a jury, and when all the evidance had been submitted, the defendant made a motion for a directed verdict. The trial court reserved decision on the motion and committed the case to the jury. The jury rendered a verdict for the plaintiff, and the trial court refused to set the verdict aside and enter a judg-

ment notwithstanding the verdict. The defendant then appealed to the Connecticut Supreme Court, which reversed and ordered judgment for the defendant notwithstanding the jury's verdict.

The plaintiff claimed to have demonstrated in the trial court that the defendant had violated the duty imposed by the common law of the State of Connecticut upon a landowner to make certain conditions on his land safe for tolerated trespassers or to warn them of such conditions. The Supreme Court held that the case was improperly submitted to the jury because the plaintiff had introduced no evidence to support one of the essential elements of her cause of action — that the defendant had knowledge or reason to know of the particular condition which injured the plaintiff.

**Question Presented**

No federal question is presented by this petition. The only conceivable constitutional claim which may be inferred from the petition is that the Connecticut Supreme Court order that judgment enter for the defendant notwithstanding the verdict invaded the province of the jury and therefore denied the plaintiff due process of law. The gravamen of the petition appears to be that the action of the court below in setting aside the jury's verdict and ordering judgment entered notwithstanding the verdict "transmutes propositions of fact into propositions of law". Petition, page 2.

## Argument

1) THE PETITION IS OUT OF TIME AND THEREFORE THIS COURT LACKS JURISDICTION TO CONSIDER IT.

This court lacks jurisdiction to hear this petition because it is out of time. The decree of the Connecticut Supreme Court sought to be reviewed was rendered on August 20, 1974. The time for filing a petition for a writ of certiorari expired 90 days later, on November 18, 1974. 28 USC §2101(c). The petition was not filed until March 10, 1975. The first "Motion for Extension of Time for Completion and Filing of Writ of Certiorari" in this case was dated January 7, 1975 and filed on January 10, 1975.

Supreme Court Rule 34(2) required that this motion be submitted at least ten days before the expiration of the period sought to be extended. Since the 90 day period within which a writ of certiorari could have been filed expired on November 18, 1974, the period within which the motion for extension of time could have been properly filed expired on November 8, 1974. Both dates were, of course, well prior to January 10, 1975, when the motion was actually filed.

As the appendix to the petition discloses, the plaintiff filed two motions for reargument in the Connecticut Supreme Court. However, these motions were not sufficient to suspend the finality of a decree under Connecticut practice. Under the rules of the Supreme Court of Connecticut: "A motion for reargument will not be entertained unless filed in writing within ten days from the date when the decision is announced." Connecticut Practice Book 1963, 1974 Cumulative Supplement, §703. The first motion for reargument was dated September 3, 1974, and was received for filing on September 5, 1974. It was thus

clearly out of time. Since the motion was out of time, its filing did not suspend the finality of the state court's judgment and therefore did not toll the running of the period limited for the filing of a petition for a writ of certiorari in the Supreme Court of the United States. **Department of Banking v. Pink,** 317 U.S. 264 (1942).

2) THE PETITION IS FRIVOLOUS.

Assuming, arguendo, that this court does have jurisdiction to consider this petition, it should be denied. It seems to request this court to examine the evidence presented in the trial court to see whether the Connecticut Supreme Court's order that a judgment n.o.v. be entered was justified by the evidence. The plaintiff thus seeks to make a writ of certiorari serve the purpose of a writ of error. To the extent that the petition may be interpreted to claim any deprivation of due process, it must be taken to claim that the state appellate court may not constitutionally overrule a jury verdict.

Of course, it has long since been settled that a state court infringes no constitutional right in taking any such action. In **Wagner Electric Manufacturing Company v. Lyndon,** 262 U.S. 226 (1923), the appellant claimed that the action of a State Court in directing a verdict against it without evidence to warrant such action deprived it of its property without due process of law, and denied it the equal protection of the laws. In denying this claim, the court stated, at 262 U.S. 231, 232:

> "The only grounds urged by the appellant for a reversal of the decree dismissing the bill of complaint are frivolous and without merit. The first involves the proposition that, in a collateral attack upon the validity of a judgment in a state court, a Federal court

> can examine the evidence to see whether a direction by the Court to a jury to find a verdict was justified by the evidence. This would be to make such an attack serve the purpose of a writ of error. More than this, even if it were held that the direction deprived the defendant of the right of trial by jury (a holding shown to be erroneous by **C. A. Treat Mfg. Co. v. Standard Steel and I. Co.,** 157 U.S. 674, 39 L.ed. 853, 15 Sup. Ct. Rep. 718), still the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution."

The respondent therefore respectfully represents that the petition for a writ of certoriari to the Supreme Court of Connecticut should be denied.

RESPONDENT,

THE CONNECTICUT LIGHT
AND POWER COMPANY

William B. Fitzgerald, Jr.
By: [illegible]
Its Attorney

Supreme Court, U. S.
FILED
APR 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1136

KAREN DERBY, P.P.A.
**Petitioner**

v.

THE CONNECTICUT LIGHT AND POWER COMPANY
**Respondent**

## REPLY BRIEF OF PETITIONER

William B. Hennessy
42 Bank Street
Waterbury, Connecticut 06702
Telephone 754-1307

Attorney for Petitioner

## JURISDICTION

The respondent's brief under Jurisdiction (p. 1) states "due process of law" but it does not state "and equal protection of the law" (petition pp. 2 and 11b) though children as well as corporations are persons under the XIVth Amendment of the Constitution of the United States.

## QUESTION PRESENTED

Respondent's brief under Question Presented states (and plainly out of context and for its argument purpose) "propositions of fact" as "the gravamen" (respondent's brief p. 2) but it does not state the conceded gravamen, its own knowledge of the fact (petition p. 3) and the law that fact, even of negligence, becomes law when so conceded and that it could not charge the petitioner and absolve itself uno flatu of the same charge (by Amendment XIV, "equal protection of the law") with reference to the "obvious danger" (R. p. 7-8, court's memorandum). And see the petition, pp. 4-7.

As to par. 1: Respondent's brief under Statement of the Case states: " . . . allegedly sustained when she fell from an apple tree . . .". The state court in its decision (p. 1). The state court in its decision states the same thing . . . "fell and sustained injuries to her head when a branch broke from an apple tree on land owned by the defendant".

Both thus omit the sine qua non "fell from a DEFECTIVE HEIGHT on the defendant's land, specifically a LARGE DEAD AND ROTTEN BRANCH . . .", both thus affecting the whole case by transmuting DEFECTIVE into NON DEFECTIVE or innocuous height to this defendant-respondent's purpose as above (respondent's brief, supra, p. 1, par. 1) and, the record will show (R. P. 22, par. 81) the admittedly OBVIOUS (R. p. 7, par. 1, last line) fact, permeating the whole of Sec. 342 (a), (b) and (c), comment (b) upon which the

plaintiff's case is based (R. pp. 7, 8 line 3) into the proposition of law (as see Brief and Appendix A of the plaintiff petitioner appended thereto (yellow-covered) at p. 15, last paragraph, last five lines, and p. 43A last two lines, with reference to the transcript of the evidence pp. 1014-1025. (Emphasis supplied).

The record and briefs disclose the extension of that error to all the elements of the plaintiff's case, a wholesale transmutation in violation of "reason" itself, re-instating all the abandoned paragraphs to the purpose, (petition 2b), in violation of its own rules (under the appendix system then in effect, infra) the law (Hennessey v. Hennessey, typically, (petition p. 3b which holds the very opposite about inference) and in violation of this plaintiff's constitutional equal protection rights (petition p. 11b) "fully argued" (as stated in petition 15b-16b) in Brief and Appendix A appended thereto).

In Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 73 L. ed. 931, at pages 936-937, this Court states:

> "An attentive examination of record disclosed not only that the finding is without fair support in the evidence, but that the evidence conclusively refutes it . . . What we have said of the evidence demonstrates, as we think, . . . laches . . . As it is apparent that had this view of the question of laches prevailed in the state court the federal right set up by the negro order must have been sustained, and the decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.
>
> "Decree reversed".

The transcript and record fairly require being called for, with certiorari, brief on the merits and argument.

Mr. Torrance honestly concedes elsewhere (see petition 15b-16b) as here (see respondent's brief in opposition to petition for writ of certiorari, from which he has withdrawn his name although of course not his appearance) and the record and the evidence and the law (2 Restatement, Torts, Second, Sec. 342) will disclose that the plaintiff has proved not only knowledge, as above, but all her affirmative allegations, and that the defendant has not proved its affirmative allegations, it is respectfully submitted. Further, the evidence and the facts are to be taken in the light most favorable to sustaining the verdict (Gallagher v. Button, 73 Conn, 172, 177, and list of cases down to the present cited with it in Connecticut's Maltbie's Appellate Procedure at page 190, and, op. cit., "the evidence may be considered in the light of the court's memorandum of decision."

In the Treat case (respondent's brief p. 5) the respondent states the court there held that the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution, but it, the respondent, does not state but omits the last paragraph of the decision, at p. 675: "If the court errs as a matter of law in so doing, the remedy lies in a review in the appropriate court.", a pattern of false assumption pursued to the end here, it is respectfully submitted, not subscribed to here by Mr. Torrance or in the state court as before pointed out (petition p. 15b, last line, to 16b) an extent of zeal in the briefs the employer doesn't show for himself, or even the respondent for itself, and hence this petition p. 13b. And quite incredibly, the record will so show, by ignoring the correction (last word in the record, R. p. 28, bottom of page) as compare R. p. 14, par. 17 and assignment of errors No. 3, subparagraph (b) with reference to said par. 17 of the finding. So that there is not even an assignment of errors, thereon, and therefore

Mr. Torrance who tried the case and argued it in the appellate court had a brief without an issue, the rest of the paragraphs of his assignment of errors (except pars. 42, 46, 49 and 50 on damages and therefore of no importance) having been abandoned in the brief for the purpose, the record will show.

And see petition p. 4, Post v. Perkins, 87 Conn. 71, 73.

Connecticut was the last of the states having the finding and appendix system referred to by Judge Blumenfeld (petition 11b) in Ralls v. Manson, United States District Court, District of Connecticut, May, 1974, Civil No. 11-205, critically. This system (as of October 1, 1974) of findings in jury cases has now been abandoned, but applies in this case, of course, and the rejection of this system in other jurisdictions also should suggest its shortcomings.

"The adequacy of state procedural bars to the assertion of federal questions is itself a federal question. Douglas v. State of Ala. (1965) 85 S. Ct. 1074, 380 U.S. 415, 13 L ed 934.

The record will disclose further, with reference to additional new matter on page 3 of respondent's Brief in Opposition to Petition for Certiorari, that the Motion for Reargument dated September 3, 1974 (petition p. 8b) was duly filed on September 3, 1974, and not out of time; further, that there is nothing in respondent's said brief to controvert the record and the tolling effect of petition's pp. 8b et seq., further that the state court considered, acted upon and denied it (petition pp. 8b, 14b, 16b) and the federal question including the new matter raised in respondent's said brief concerning the petitioner's constitutional equal protection rights ("certainly as obvious to the defendant" quoting the petition, p. 15b, fifth line from bottom of page 15b).

See also, with reference to this new matter so urged in respondent's brief at p. 4, Milardo v. Branciforte, 108 Conn. 451, at p. 453: "At the most it was an irregularity which counsel for the appellees could waive. Since he made no objection to the filing of the appeal and took no action whatever until nearly three months later, he must, in any event, be held to have waived the irregularity, especially in a proceeding so little favored as a plea in abatement." The importance and substantiality of the instant is readily demonstrated by the substance and importance of the subject and the following in addition to the table of citations in petition opening p. i:

68 YLJ 633 at pp. 648-649, 693-704

24 CBJ (Conn. Bar Journal) 61, 77

United Zinc & Chem. Co. v. Britt, 258
U.S. 268, 66 L ed 615, 36 ALR 28,
now overrulled in accordance with dissenting
opinion of Mr. Justice Day.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Petitioner,
Karen Derby, p.p.a.
By William B. Hennessy
Her Attorney